JD–54–19
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AT&T MOBILITY LLC

and Case 05-CA-178637

MARCUS DAVIS,
An Individual

Paul J. Veneziano, Esq., for the General Counsel.
Stephen J. Sferra and Jeffrey A. Seidle, Esqs. (Littler Mendelson, P.C., Cleveland, Ohio) for the Respondent.
Katherine A. Roe, Esq., (Communication Workers of America, Washington, D.C.) for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. I issued a decision in this matter on April 25, 2017. On September 28, 2018, the Board issued a Notice to Show Cause as to why the complaint allegations involving the maintenance of an allegedly unlawful work rule should not be severed and remanded for further proceedings consistent with the standards set forth in the Board's decision in *Boeing,* 365 NLRB No. 154, slip op. at 14-17 (2017). On March 19, 2019, the Board issued an Order remanding this matter to me for preparation of a supplemental decision addressing the complaint allegations in light of *Boeing*.

This case was tried in Washington, D.C. on February 10, 2017. Marcus Davis filed the charge on June 20, 2016 and the General Counsel issued the complaint on October 14, 2106. The General Counsel alleged that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad Privacy of Communications rule and by threatening employees with discharge if they violate this rule. In response to the Notice to Show Cause, the General Counsel requested that the Board dismiss the allegation regarding Respondent's maintenance of its Privacy of Communications policy. The Board denied that request and remanded the entire case to me for further consideration. The General Counsel in its brief on remand renews its request that this complaint allegation be dismissed, while requesting that I find that Respondent violated Section 8(a)(1) by threatening to discharge employees for violating the rule.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a limited liability company which has facilities nation-wide, including retail stores in the District of Columbia, where it annually provides wireless telecommunications devices and services. Respondent derives gross revenues in excess of $100,000 annually and purchases and receives goods and materials in excess of $5,000 from outside the District of Columbia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Communications Workers of America, (of which the Charging Party is a member) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Marcus Davis is a retail sales associate at Respondent's store at Dupont Circle in Washington, D.C. He is also the union steward for CWA Local 2336 for five stores in the Washington, D.C. area. On or about May 19, 2016, Davis attended a meeting in the store manager's office at Respondent's Chevy Chase, D.C. store. The purpose of the meeting was for Respondent to present a termination notice to a sales associate who worked at the Chevy Chase store. Davis recorded the meeting, which lasted approximately 20 minutes, on his company owned phone and his personal cell phone, without telling management.

The Chevy Chase store manager, Richard Belot, suspected that Davis might have recorded the meeting. He called his supervisor, Area Sales Manager Andrew Collings, for instructions. Collings consulted with Respondent's human resources department. When Collings returned Belot's call, Davis had returned to the Dupont Circle Store. Collings then called Jason Yu, the manager of that store. He instructed Yu to retrieve the phone, delete the recording and counsel Davis. Yu complied with Collings' instructions. He called Davis into his office, first to delete the recording and a second time to administer the coaching.[1]

The next day Collings conducted a routine visit to the Dupont Circle store, which he did about once a week. Collings spoke to Davis in the backroom of the store. Collings told Davis that recording conversations inside any of Respondent's stores violated company policy. He then said that Davis should not encourage other employees to record in-store conversations and that "he did not want anyone held accountable for not following policy," Tr. 65.[2]

[1] The Dupont store has public and non-public areas. The non-public areas are in the back of the store and include restrooms, a break area and the store manager's office. There is a computer in the non-public back of the store where employees can access emails and process products and services.

[2] Davis' account of this conversation is that Collings said, "I've fired people for that." I credit

The policy in question is found on Respondent's intranet site, as part of Respondent's Privacy in the Workplace Policy, and provides:

> **Privacy of Communications**
> Employees may not record telephone or other conversations they have with their co-workers, managers or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and any applicable company policy.

G.C. Exh. 2; R. Exh. 1.

On May 27, 2016, Collings sent an email to Davis and Local Union Vice President Robin Jones reiterating that employees are not permitted to record conversations inside any of Respondent's stores, citing the policy set forth above.

The protection of customer information and data is covered by other policies not at issue in this case, Exhs. R-5, 6, 7 and 8. AT& T Mobility has gone to great lengths to protect customer data. The legal and business consequences of a breach of customer data for Respondent are very significant, Tr. 70-100.

Analysis

Relevant Case Law

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). In *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).the Board held that a rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; or 2) that the rule was promulgated in response to protected activity or 3) that the rule has been applied to restrict the exercise of Section 7 rights. In *Boeing,* 365 NLRB No. 154, slip op. at 14-17 (2017), the Board overruled *Lutheran Heritage* and held that in cases in which one or more facially neutral policies, rules or handbook provisions when reasonably interpreted would potentially interfere with Section 7 rights, the Board will evaluate two things: (1) the nature and extent of the potential impact on NLRA rights and (2) the legitimate justification associated with the requirement. The Board further stated that it is its duty was to strike a proper balance between these considerations.

Several relatively recent decisions have addressed photographing and recording by employees on company property. In *Flagstaff Medical Center,* 357 NLRB 659 (2011) the Board found that a hospital's rule prohibiting the use of cameras for recording images of patients and/or hospital equipment, property, or facilities, did not violate the Act.

Collings but do not regard the difference in their versions of the conversation to be significant. Either one communicated to Davis that employees might be disciplined for violation of Respondent's rule.

In *Rio All-States Hotel & Casino,* 362 NLRB No. 190 (2015) the Board found a rule that prohibited the use of any type of audio-visual recording equipment and/or recording device unless authorized for business purposes, to be illegal. The Board distinguished the case from *Flagstaff Medical Center* by concluding that the Casino's rules included no indication that they were designed to protect privacy or other legitimate interests. The *Boeing* decision explicitly overruled *Rio All-States Hotel & Casino.*

Neither *Flagstaff Medical Center* nor *Boeing* are necessarily dispositive of the instant case. In the *Boeing* decision, the Board stated that it may draw reasonable distinctions between or among different industries and work settings, *slip opinion* at 15. Respondent has not established that its security concerns, that are not otherwise protected by its policies on customer data and information, are comparable to the security concerns present in a hospital, i.e., patient medical information under HIPPA (*Flagstaff*) or a military/civilian aircraft manufacturing plant (*Boeing*). Also a general matter, audio recording is far less likely to disclose confidential information than photography.

In *Whole Foods Market, Inc.* 363 NLRB No. 87 (2015) enfd. 691 Fed. Appx.(2d Cir. 2017) the Board found illegal two company rules. One prohibited the recording of phone calls, images or company meetings with any recording device unless prior approval is received from management, or all parties to the conversation consent to its recording. Violation of this rule could lead to discipline up to and including discharge.

The second rule was similar. Whole Foods stated as its purpose the elimination of a chilling effect on the expression of views if one person is concerned that the conversation is being secretly recorded. The Board found both rules illegal. The Board citing *Rio All-States Hotel & Casino* stated that photography and audio or video recording in the workplace…are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. The Board distinguished *Flagstaff Medical Center* by concluding that Whole Foods' business justification is not nearly as pervasive or compelling as the patient privacy interest in *Flagstaff*.

The Board, relying on *Rio All-States Hotel* and *Whole Foods,* reversed the Judge's finding that an employer's rule was not violative in *T-Mobile, Inc.,* 363 NLRB No. 171 (2016), enf. denied 865 F. 3d 265 (5th Cir. 2017). In *T-Mobile,* while tacitly acknowledging the employer's interest in maintaining employee privacy, confidential information and promoting open communication, the Board found the rule to be violative because it was not narrowly tailored to promote its legitimate interests and would reasonably be construed to restrict employees' Section 7 rights.

Further in both the *Whole Foods* and *T-Mobile* decisions, the Board noted that protected conduct may include a number of things including recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions. The Board has stated, "moreover, our case law is replete with examples, when photographs or recording, often covert was an essential element in vindicating the underlying Section 7 right," 363 NLRB No. 87, slip op. 3 at fn. 8.

My experience as an NLRB judge for over 20 years confirms that assessment, e.g. *Spirit Construction Services,* 351 NLRB 1042 1042-43 (2007)[audio recording of an on-site threat of business closure by a supervisor in response to a union organizing drive]; *Valmet, Inc.,* 367 NLRB No. 84 (February 4, 2019), slip opinion pp. 7-9 [employee audio recording of company's mandatory meeting during an organizing drive]. *Kumho Tires,* JD-42-19, 2019 WL 2106674 (May 19, 2019). Without the recording in these cases, it may have been impossible to determine that the employee's version of events was more credible than that of the Respondent. Thus, the complaint may well have been dismissed and the employer would have successfully interfered with employee's Section 7 rights. [3]

Moreover, there will be situations in which pro-union employees concertedly agree to record an employer's captive audience address based upon the employer's prior campaign activities. These employees would be protecting their Section 7 rights and the act of recording would thus be protected. A blanket rule, such as Respondent's, would clearly impact Section 7 rights in such a context. A rule like Respondent's might also interfere with an employee's ability to prove that his or her conduct was concerted by recording a conversation with co-workers. Conversely, an employer may wish to record workplace disputes in support of its discipline. In grievance or arbitration proceedings, such evidence would be admissible and persuasive.

The law as applied to this case

Respondent's rule prohibiting recordings is illegal

Pursuant to Boeing, the first issue to be addressed is whether Respondent's facially neutral rule has any impact of employees' Section 7 rights. As the Union points out, the very fact that the rule was applied to protected activity establishes its impact of employee rights.[4]

Moreover, the rule in allowing Respondent's legal department unfettered discretion as to when to allow conversations to be recorded is an open invitation to disparate treatment of employees engaged in protected activity. Generally, a rule that requires pre-approval by the

[3] It may be impossible to get a sufficient number of employees to accurately testify as to what they heard for a variety of reasons, including inattention, coercion and poor or conflicting memories.

Also, it is often very difficult to make credibility determinations in cases in which the only evidence is conflicting versions of events, particularly when the conflict is between only 2 witnesses, e.g., *Loudon Steel, Inc.* 340 NLRB 307 (2003). Witnesses' demeanor is more often than not a very unreliable way to make such determinations.

[4] In *Boeing,* the Board delineated 3 categories of "rules." Category 1 rules are those which are lawful because they either (1) do not prohibit or interfere with employee Section 7 rights when reasonably interpreted, or (2) the employer's justification for the rule outweighs the potential adverse impact on protected rights. Category 2 rules are those which warrant individualized scrutiny as to whether they prohibit or interfere with section 7 rights and whether legitimate justifications outweigh any adverse impact on these employee rights. Category 3 rules are those which are unlawful because the justification for their maintenance does not outweigh their adverse impact on employee Section 7 rights. A rule which is not unlawful to maintain, may be unlawful as applied. However, the Board also stated that the categorization of rules is not part of its new test. However, I would place Respondent's rule in Category 2 because as reasonably interpreted it would prohibit or interfere the exercise of Section 7 rights.

employer to engage in protected activity violates the Act, *Brunswick Corp.,* 282 NLRB 794, 795 (1987).

In addition, the rule has a material impact in preventing employees from preserving evidence of employer unfair practices as an employee did in *Sprit Construction* and *Valmet.* There would be little reason for an employee will go to the trouble of recording a conversation or speech by a manager, supervisor or agent unless he suspects that conversation will touch upon wages, hours and other conditions of employment. The employee in *Valmet* recorded the manager's speech precisely because he knew it involved the Union's organizing drive. The same is true of the employee recording a captive audience speech in *Kumho Tires,* JD-42-19, 2019 WL 2106674 (May 19, 2019).

As to the second prong of *Boeing,* Respondent has a pervasive and compelling interest in the privacy of customer information (Customer Proprietary Network Information (CPNI),[5] the content of customer communications and Sensitive Personal Information (SPI).[6] The issue in this matter is whether the business justification for Respondent's rule outweighs its impact on employees' Section 7 rights.

On balance, the adverse impact of Respondent's privacy of communications rule on employee rights outweighs its justifications. First of all, it is not limited to work time and/or conversations in work areas, or even conversations on Respondent's premises. Secondly, Respondent could protect its substantial interests with a much narrower rule, e.g., that makes it a violation of company policy to record in any manner customer information or data. I would note that Respondent prohibits accessing any such data and considers it a breach of its duty if such data is accessed even inadvertently. Employees are trained to understand what constitutes CPNI and SPI, so that they do not even inadvertently access such information. Respondent does so because, as its brief sets out in great detail, there are potential draconian consequences for unauthorized access to CPNI and other customer data, as well as its disclosure.

Since employees are so thoroughly trained not to access CPNI and SPI, it should not be particularly burdensome to promulgate and enforce a rule that prevents the audio and visual recording of such data, just as it prohibits the unauthorized viewing of such data. Indeed, Respondent's Code of Business Conduct, R. Exh. 5, requires each of its employees to guard the privacy of customer communications. It also states that employees must protect information that customers entrust to AT & T Mobility. Respondent warns employees that improper access to customer accounts can lead to discipline, R. Exh. 7. Indeed, it has fired employees for such improper access and prevailed in an arbitration over such a termination, R. Exh. 9.

Respondent notes that workplace discussions routinely involve CPNI, R. brief at 8. However, the company maintains a "rule of least privilege" that limits access to customer information only to those who need to access such information to perform their job. Thus, an employee who is not authorized to access such information should not be involved in any conversation that included such information. Therefore, the danger of an employee recording

[5] CPNI includes such things as the number of lines a customer has, call patterns and usage, services on an account and billing information.

[6] SPI includes social security numbers, date of birth and credit card payment information.

CPNI or SPI is materially diminished. Moreover, an employee who is authorized to access CPNI is trained to recognize it. Thus, a rule forbidding the recording of conversations including a discussion of CPNI or SPI should be sufficient to protect Respondent's pervasive and compelling interest in the privacy of customer information.

Indeed, the facts of this case establish Respondent's business justification for its Privacy of Communications rule is outweighed by its impact on employees' Section 7 rights. There is no indication that customer information was discussed at the meeting at the Chevy Chase store that Davis recorded. Neither Collings nor Yu would have been allowed to discuss information with Davis that Davis was not authorized to access. On the other hand, the discussion did involve an issue of employees' Section 7 rights.[7] Furthermore, if the issue of whether Davis or other employees were threatened with discharge required a credibility determination, a recording would most likely have been determinative.

Respondent illegally threatened Davis and other employees

I completely agree with Respondent that, in this case, if its rule is legal, Collings statement to Marcus Davis. must also be legal. The threat allegation in this case is wholly dependent on the policy's lawfulness or unlawfulness. Enforcement of a legal rule cannot be a violation of the NLRA, unless, for example, it is enforced disparately.

However, since I find that Respondent's policy infringes on Section 7 rights and is not sustained by valid and relevant business reasons. Andrew Collings' statement to Marcus Davis, that he did not want anyone held accountable for not following Respondent's Privacy of Communications policy, is a threat that violates Section 8(a)(1). The statement obviously implies that future violations of the rule may be grounds for discipline and maybe even discharge. The threat was made in response to Davis' violation of Respondent's rule in the course of his protected activities as union steward, *Thor Power Tool Co.*, 148 NLRB 1379, enfd. 351 F.2d 584 (7th Cir. 1965).

Conclusions of Law

1. The business justifications for Respondent's Privacy of Communications policy do not outweigh its adverse impact on employees' Section 7 rights and therefore its maintenance and enforcement as written violates Section 8(a)(1) of the Act.
2. Respondent violated Section 8(a)(1) by impliedly threatening Marcus Davis and others with discipline if they violated the rule again while engaged in protected activity.

[7] In evaluating the legality of Respondent's rule, consideration must be given to the fact that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). Davis' activities in the grievance meeting constituted protected activity, which was not forfeited by flagrant misconduct, *Thor Power Tool Co.*, 148 NLRB 1379, enfd. 351 F.2d 584 (7th Cir. 1965); *Union Fork & Hoe Co.,* 241 NLRB 907 (1979).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, AT & T mobility, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a Privacy of Communications rule, which prohibits employees from recording all conversations they have with coworkers, managers or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and any applicable policy.
(b) Impliedly threatening employees with discipline if they do not comply with the Privacy of Communications rule.
(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind it Privacy of Communications Rule.
(b) Notify employees that the Privacy of Communications rule has been rescinded.
(c) Within 14 days after service by the Region, post at its District of Columbia stores copies of the attached notice marked "Appendix"[9] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 19, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 1, 2019

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the Privacy of Communications rule included in our Privacy in the Workplace policy published on our intranet webpage that prohibits employees from recording telephone or other conversations they have with their co-workers, managers, or third-parties unless approved by our legal department, required for our business, and in compliance with the law and our policies.

WE WILL NOT threaten you with discipline for violating our Privacy of Communications rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our Privacy of Communications rule and effectively notify you of the rescission and that the rule will no longer be enforced.

AT&T MOBILITY LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Bank of America, Tower II, 100 S. Charles Street, Suite 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-178637 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2864.